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THE SUPREME COURT FINDS AEREO A DIRECT INFRINGER, JUSTICE BRANDEIS (AND SCALIA) DISSENT

By **Giancarlo Frosio** on July 1, 2014 at 7:13 am

Recently, the United Sates Supreme Court decided American Broadcasting Cos. v Aereo, holding that "Aereo publicly performs copyrighted works, in violation of the Copyright Act's Transmit Clause, when it sells its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air." However, the dissenting opinion argued that turning a secondary liability case into a direct liability case is a mistake and may work serious injury to the general public.

The Supreme Court described Aereo's service as follows:

> Respondent Aereo, Inc., sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air. When a subscriber wants to watch a show that is currently airing, he selects the show from a menu on Aereo's website. Aereo's system, which consists of thousands of small antennas and other equipment housed in a centralized warehouse, responds roughly as follows: A server tunes an antenna, which is dedicated to the use of one subscriber alone, to the broadcast carrying the selected show. A transcoder translates the signals received by the antenna into data that can be transmitted over the Internet. A server saves the data in a subscriber-specific folder on Aereo's hard drive and begins streaming the show to the subscriber's screen once several seconds of programming have been saved. The streaming continues, a few seconds behind the over-the-air broadcast, until the subscriber has received the entire show.

Essentially, the question before the Court was: "does Aereo "transmit . . . a performance" when a subscriber watches a show using Aereo's system, or is it only the subscriber who transmits?" Therefore, is Aereo directly liable for copyright infringement or only potentially liable for secondary infringement?

American Broadcasting Cos. argued that Aereo was a direct infringer and violated the broadcasters, television producers, marketers and distributors' exclusive right to "perform" copyrighted works "publicly."

Aereo had a different view and sustained that it did "no more than supply equipment that emulate[s] the operation of a home antenna and [digital video recorder (DVR)]. [. . .]. Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who "perform" when they use Aereo's equipment to stream television programs to themselves." Also, Aereo emphasizes that

> the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not

> transmit data saved in one subscriber's folder to any other subscriber. When two subscribers wish to watch the same program, Aereo's system activates two separate antennas and saves two separate [. . .] copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions-each from the subscriber's personal copy.

The Court agreed with the petitioners and held that "Aereo *performs* petitioners' works publicly within the meaning of the Transmit Clause. [. . .] It does not merely supply equipment that allows others to do so" (emphasis added). The Court came down to this finding by arguing that Aereo looks like a cable system, although in fact it is not, therefore it "performs" like cable systems do when they retransmit over-the-air broadcast, according to the Copyright Act.

In his dissenting opinion, joined by Justice Thomas and Alito, Justice Scalia strongly objected to the majority view and noted that "Aereo does not perform at all. The Court manages to reach the opposite conclusion only by disregarding widely accepted rules for service-provider [. . .] liability and adopting in their place an improvised standard ("looks-like-cable-TV") that will sow confusion for years to come."

The dissenting opinion argued that a "volitional-conduct requirement" must be met "when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system." The bright line rule that courts have applied here is whether the providers choose the content or not. If they do not choose the content and only the users do, they should not be held directly liable.

The majority decision now trades that clear rule for determining whether the provider of an automated, user-controlled system committed the infringing act with a broad "ad hoc rule for cable-systems lookalikes" and "provides no criteria for determining when its cable-TV-lookalike rule applies."

As Scalia noted, the fact that apparently Aereo has engineered a system hacking a loophole in the law does not mean that "we need [to] distort the copyright act to forbid it." Secondary liability for infringement of the right to perform still remains a potentially valid redress to prevent Aereo conduct as well as primary and secondary liability for infringement of the right of reproduction. If all this fails to provide a relief, "what we may have before us must be considered a loophole in the law" but "[i]t is not the role of this Court to identify and plug loopholes," Scalia reminded the majority. Furthermore, the dissenting opinion continues:

> The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. *Then the creation or recognition by courts of a new private right may work serious injury to the general public*, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency. (emphasis added)

Oops…sorry my sources must have got mixed up. Actually, this was Justice Luis Brandeis delivering his dissenting opinion in International News Services v. Associated Press in 1918, exactly at pages 262-263. The correct cite form Justice Scalia reads as follows: "[i]t is [. . .] the role of Congress to eliminate [loopholes] if it wishes. Congress can do that, I may add, in a much more targeted, better informed, and less disruptive fashion than the crude "looks-like-cable-TV" solution the Court invents today."

Almost a century ago, Justice Brandeis argued that stretching copyright law in order to create new property rights over information and news may not have served the public interest. *INS v. AP* was a milestone in a long history of increasing enclosure of the public domain, which has helped the formation of large cultural conglomerates, restricted competition, and disempowered democratic process by making speech dependent on market power. Similarly, today, Justice Scalia warns the Court that expanding leverage power of property owners over innovation and technological development by substituting clear cut rules with broader amorphous standards may lower incentives for newcomers and innovators. The dissenting opinion stresses that "[i]t will take years, perhaps decades, to determine which automated systems now in existence are governed by the

traditional volitional-conduct test and which get the Aereo treatment." Meanwhile, in this blurred legal landscape, "automated systems now in contemplation will have to take their chances," especially cloud storage providers.

The tradeoff, the rightsholders claim, is that broadcast television may be in danger. Aereo, they state, "is to the American [broadcasters] and the American public as the Boston strangler is to the woman home alone." No, wait, that was Jack Valenti's testimony before the Congress prior to the Sony decision in 1982 and he was talking about the movie industry, rather than the broadcasters. Many apologies, I had my quotes mixed up once again. In the Aereo case, perhaps less emphatically, the rightsholders just claimed that "the very existence of broadcast television as we know it" is at stake. Whether this may have been the case in the present scenario, we cannot foresee. In stark contrast to Valenti's statement, for example, the video rental market has contributed significantly to the present fortunes of the movie industry. However, I personally join Justice Scalia in believing that "the proper course is not to bend and twist the Act's terms in an effort to produce a just outcome, but to apply the law as it stands and leave to Congress the task of deciding whether the Copyright Act needs an upgrade."

For now, Aereo finally had to disrupt its services in the aftermath of the Supreme Court decision. Fox immediately decided to try to use this new ruling to shut down Dish mobile streaming services, after other broadcasters tried and failed in the past. Many more services may be taken down by a looks-like-something-that-is-protected-by-copyright-law rule in the near future. Others may never be developed because the incentives to create are now off set by the legal risks involved.

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